BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CASEY FROESE	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,036,333
TRAILERS & HITCHES INC.	)	
Respondent	)	
AND	)	
	)	
FIRSTCOMP INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent appeals the May 6, 2010, preliminary hearing Order of Administrative Law Judge John D. Clark (ALJ). Claimant is confined to a wheelchair because of a work-related accident. The ALJ determined that it is medically necessary that his home be modified and ordered the necessary modifications to claimant's home with Heartland Home Improvement (Heartland) as the authorized contractor.

Claimant appeared by his attorney, Kevin T. Stamper of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Joseph R. Ebbert of Kansas City, Missouri.

This Appeals Board Member adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of the transcript of Preliminary Hearing held December 13, 2007, with attachments; the transcript of Preliminary Hearing held May 6, 2010, with attachments; and the documents filed of record in this matter.

ISSUES

1. Did the ALJ err in ordering respondent to pay for the accommodations deemed necessary by Heartland, with no determination by the ALJ as to the extent of those modifications? Respondent argues that the ALJ exceeded his jurisdiction in ordering benefits without a determination as to the extent or the reasonableness or necessity of those modifications.

2. Does K.S.A. 2006 Supp. 44-510h allow for home modifications as a form of medical treatment? Respondent argues that there is no statutory or regulatory provision which allows or requires home modifications as a form of medical treatment nor as an apparatus as defined under K.A.R. 51-9-2.

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed.

Claimant was injured on June 6, 2007, while working for respondent. There is no dispute as to the compensability of that injury. As a result of his injuries, claimant is a paraplegic and is confined to a wheelchair. This matter previously came before the Board on an appeal from a preliminary hearing Order of December 14, 2007, at which time claimant requested a new vehicle with handicapped accessible modifications. The Board allowed for the modifications as medical treatment, but denied claimant's request for the purchase of a new vehicle.

The current dispute deals with requested modifications to claimant's home. The modifications would allow claimant more access and create a safer environment within which claimant would live, with his family.

At the preliminary hearing, the evidence was limited to a letter from claimant's attorney requesting the unspecified modifications and a brochure describing the company that claimant has requested to do the modifications. No evidence as to the nature or extent of the modifications was provided to the court. The ALJ, obviously upset with respondent and its insurance company, ordered the necessary modifications with neither evidence of nor a determination as to the extent of the requested changes.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[1]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[2]

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[1] K.S.A. 2006 Supp. 44-501 and K.S.A. 2006 Supp. 44-508(g).

[2] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[3]

The Board's review of preliminary hearing orders is limited. Not every alleged error in law or fact is subject to review. The Board can review only allegations that an administrative law judge exceeded his or her jurisdiction.[4] This includes review of the preliminary hearing issues listed in K.S.A. 44-534a(a)(2) as jurisdictional issues, which are (1) whether the worker sustained an accidental injury, (2) whether the injury arose out of and in the course of employment, (3) whether the worker provided timely notice and timely written claim, and (4) whether certain other defenses apply. The term "certain defenses" refers to defenses which dispute the compensability of the injury under the Workers Compensation Act.[5]

> Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.[6]

K.S.A. 2006 Supp. 44-510h(a) states:

> It shall be the duty of the employer to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, apparatus and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director, in the director's discretion, so orders, including transportation expenses computed in accordance with subsection (a) of K.S.A. 44-515 and amendments thereto, as may be reasonably necessary to cure and relieve the employee from the effects of the injury.

In *Hedrick*,[7] the Kansas Court of Appeals held: "Under the facts of this case, the Workers Compensation Board erred in concluding that claimant's costs in purchasing a larger car were medical treatment under K.S.A. 44-510(a)." The court, however, expressly

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[3] K.S.A. 2006 Supp. 44-501(a).

[4] K.S.A. 2009 Supp. 44-551(i)(2)(A).

[5] *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, Syl. ¶ 3, 994 P.2d 641 (1999).

[6] *Allen v. Craig*, 1 Kan. App. 2d 301, 303-04, 564 P.2d 552, *rev. denied* 221 Kan. 757 (1977).

[7] *Hedrick v. U.S.D. No. 259*, 23 Kan. App. 2d 783, Syl. ¶ 3, 935 P.2d 1083 (1997).

limited its holding to the facts before it and suggested a different result was possible where the claimant was a paraplegic.

> In closing, we note that this case does not involve a paraplegic claimant who seeks a specially equipped vehicle under the Workers Compensation Act. Among jurisdictions which have addressed that problem, there is a split of authority. The varying results depend to a large degree on the peculiar language found in the various states' workers compensation laws. See 2 Larson's Workmen's Compensation Law, § 61.13(a); 82 Am. Jur. 2d, Workers' Compensation § 394, p. 422. Those cases are helpful only to the extent they reinforce our statutory requirement that medical treatment be reasonably necessary.[8]

In discussing *Hedrick*, the Board has noted that "[o]bviously, the context in which the services are provided is significant to any determination of what constitutes medical treatment."[9] The Board has, under certain circumstances, determined that such things as a hot tub[10], a computer[11], and a mattress[12], constituted medical treatment. And the Court of Appeals has held that a custom-made brassiere is reasonable medical treatment.[13] Whereas in another case, the Board has denied the payment of utility bills.[14]

> The problem with trying to separate what is a reasonable medical necessity from what is dictated by convenience and/or lifestyle is that these two categories can sometimes overlap. That is particularly true in this case because claimant's paraplegia renders difficult many daily activities that most people take for granted. Furthermore, the claimant's mental or emotional health is an important medical goal in and of itself and it can also be a significant part of an individual's physical health. Thus, the line between medical necessity and lifestyle becomes blurred and at times is nonexistent. Nevertheless, as the Assistant Director pointed out, citing Hedrick v. U.S.D. No. 259, 23 Kan. App. 2d 783, 935 P.2d 1083 (1997), respondent cannot reasonably be held responsible for all the expenses associated with the

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[8] *Id.* at 788.

[9] *Butler v. Jet T.V.*, No. 106,194, 2004 WL 1058372 (Kan. WCAB Apr. 16, 2004).

[10] *Fernandez v. Safelite Auto Glass*, No. 244,854, 2002 WL 31828620 (Kan. WCAB Nov. 20, 2002).

[11] *Fletcher v. Roberson Lumber Company*, No. 231,570, 1999 WL 195653 (Kan. WCAB Mar. 1999).

[12] *Conner v. Devlin Partners, LLC*, No. 1,007,224, 2005 WL 831913 (Kan. WCAB Mar. 11, 2005); *Goodwin v. Southland Corporation d/b/a 7-Eleven Stores*, No. 216,691, 2000 WL 973229 (Kan. WCAB June 29, 2000).

[13] *Gorden v. IPB, Inc.*, Nos. 84,110 and 84,173, unpublished Court of Appeals decision filed October 27, 2000.

[14] *Bhattarai v. Taco Bell*, No. 261,986, 2002 WL 1838755 (Kan. WCAB July 26, 2002).

> accommodations that claimant's disability may require. Some modifications, while easily justifiable as related to claimant's disability, may nonetheless be outside the coverage of the Workers Compensation Act. The Board cannot require respondent to provide more than what is provided for in the Act, even where the request addresses what could be considered a basic need.[15]

The Board must first determine whether it has jurisdiction over this question. As noted above, the Board has held in the past that modifications to a house can be seen as a form of medical treatment. In ordering medical treatment in the form of home modifications, the ALJ in this instance did not exceed his jurisdiction under K.S.A. 44-534a.

However, is it proper for the ALJ to make a determination regarding those home modifications with a blanket order to a construction company, without a determination as to what will be allowed on the reasonableness of the charge? The Order of the ALJ allows "the necessary modifications to the Claimant's home". The ALJ did not exceed his jurisdiction in ordering the necessary modifications. The concern is that the authorized company may determine certain modifications to be necessary. However, the ALJ, at the time of the regular hearing, may determine already created modifications to be "not reasonable and necessary" to relieve claimant of the effects of this injury. A wise course might be to submit the recommendations and cost estimates from the company and the health care provider to the ALJ prior to construction. This will, hopefully, allow the parties the opportunity to avoid future disputes over what will be paid for and what will be denied after the cost has already been incurred.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[16] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

The ALJ did not exceed his jurisdiction in ordering respondent to pay for necessary modifications to claimant's home with Heartland Home Improvement as the authorized contractor. Neither K.S.A. 2006 Supp. 44-510h nor K.A.R. 51-9-2 prohibit the modification of the home to accommodate claimant's need for handicapped accessible facilities.

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[15] *Butler v. Jet TV*, No. 106,194, 1998 WL 229860 (Kan. WCAB Apr. 14, 1998).

[16] K.S.A. 44-534a.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Order of Administrative Law Judge John D. Clark dated May 6, 2010, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of July, 2010.

HONORABLE GARY M. KORTE

c: Kevin T. Stamper, Attorney for Claimant
Joseph R. Ebbert, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge